

**FARRIS MATHEWS BRANAN
BOBANGO & HELLEN, PLC**

ATTORNEYS AT LAW

Charles B. Welch, Jr.
cbwelch@farris-law.com

HISTORIC CASTNER-KNOTT BUILDING
618 CHURCH STREET, SUITE 300
NASHVILLE, TENNESSEE 37219

Telephone: (615) 726-1200
Facsimile: (615) 726-1776

Writers Direct Dial:
615-687-4230

October 9, 2001

David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

VIA HAND DELIVERY

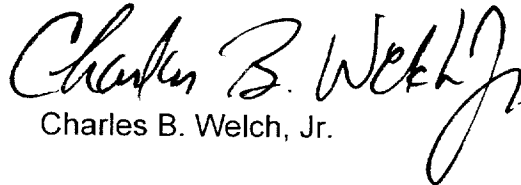
Re: Docket to Establish Generic Performance Measures, Benchmarks, and
Enforcement Mechanisms for BellSouth Telecommunications, Inc.
Docket No. 01-00193

Dear Mr. Waddell:

Enclosed please find an original and thirteen (13) copies of Time Warner Telecom of the Mid-South, L.P.'s Post-Hearing Brief in the referenced docket. Copies have been provided to all parties of record.

Very truly yours,

**FARRIS, MATHEWS, BRANAN,
BOBANGO & HELLEN, P.L.C.**


Charles B. Welch, Jr.

Enclosure

cc: Carolyn Marek
All parties of record

BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE:)	
)	
DOCKET TO ESTABLISH GENERIC)	Docket No.
PERFORMANCE MEASUREMENTS,)	01-00193
BENCHMARKS, AND ENFORCEMENT)	
MECHANISMS FOR BELL SOUTH)	
TELECOMMUNICATIONS, INC.)	

TIME WARNER TELECOM OF THE MID SOUTH, L.P.'S POST-HEARING BRIEF

COMES NOW Time Warner Telecom of the Mid South, L.P. ("Time Warner") and hereby submits its post-hearing brief. As set forth in detail hereinbelow, Time Warner requests that the Tennessee Regulatory Authority ("TRA") adopt performance measurements and enforcement mechanisms applicable to BellSouth Telecommunications, Inc. ("BellSouth") for the ordering, provisioning, and maintenance of special access services sold on a wholesale basis to its Competitive Local Exchange Carriers ("CLECs").

I. BACKGROUND

Time Warner is a facilities-based CLEC operating in over forty (40) markets nationwide. On August 25, 1995, Time Warner was granted a certificate of authority to provide local exchange service in the State of Tennessee,¹ and Time Warner is currently providing telecommunications services in Tennessee. In order to do so, Time Warner has invested in, and deployed its own switching and fiber optics infrastructure for the primary purpose of serving medium and large-sized business customers. The majority of the products offered by Time Warner are delivered to end user customers over its own network facilities. However, there are a significant number of occasions when Time Warner must

¹Tennessee Public Service Commission, Docket No. 93-0298.

rely on BellSouth's embedded facilities for the "last mile" loop to various buildings or geographic locations to deliver service to its customers. In these instances, Time Warner has chosen to purchase high capacity services such as DS1s and DS3s from BellSouth's special access tariff, rather than purchasing equivalent unbundled or resold high capacity circuits through its interconnection agreement with BellSouth. Time Warner purchases special access services on a wholesale basis for the sole purpose of supplementing its own network facilities to provide retail telecommunications service to its end user customers.

Special access circuits provide dedicated connections between locations served by BellSouth's network. The components of special access include local loops known as local distribution channels, interoffice transport, and multiplexing. BellSouth does not currently provide a product or unbundled network elements (UNEs) that when combined, provide(s) the same as or materially comparable to the ordering, provisioning, and maintenance attributes of special access. As Time Warner developed its Tennessee business plan in late 1996, it did so based upon the provisions of its interconnection agreement with BellSouth which had an effective term from June 1, 1996 through May 31, 1998. This interconnection agreement did not provide for the sale and purchase of UNEs by way of local service requests ("LSRs"). At that time, the only service available to CLECs for the purpose of purchasing necessary facilities was special access ordered by way of access service requests ("ASRs"). Ultimately, BellSouth developed its categories of UNEs, but unilaterally maintained the special access classification which remains the only means by which to purchase this service necessary to Time Warner's business operations.

Time Warner and other CLECs purchase special access from BellSouth for the

same purposes that UNEs or resold services are purchased and used in completing network facilities to the ultimate retail customer. Thus, timely and nondiscriminatory provisioning of special access services is critical to the development of effective local and intrastate competition.

II. ARGUMENT

A. Functionally equivalent special access high capacity service should be incorporated into the Performance Measurements and Enforcement Mechanisms Plan Adopted by the TRA.

BellSouth is the dominant provider of special access service in Tennessee. BellSouth, therefore, is not only Time Warner's retail competitor; it is also Time Warner's wholesale supplier of essential facilities, representing the only economically viable option for providing the last mile of the network to the end user customer. BellSouth's competitors are as dependent on the timely and proper provisioning of BellSouth's special access services as are competitors that purchase functionally equivalent high capacity services on an unbundled or a resale basis. Delays in provisioning are particularly problematic with large business customers that do not usually tolerate unanticipated delays or problems in obtaining service. If a CLEC promises a customer service on a certain date and that date is not met due to a BellSouth problem, the CLEC's reputation suffers irreparable harm. Consequently, receiving quality service from BellSouth, whether the CLEC orders service out of a tariff or interconnection agreement, is essential to the development of robust competition.

In the current environment, BellSouth does not provide Time Warner and other CLECs reporting metrics sufficient to capture its actual performance in the delivery of

special access service or a system of self-effectuating remedies that serve as an incentive for BellSouth to correct or improve service delivery. BellSouth reports performance in only eight (8) special access metrics, and offers only two (2) performance measures as part of the tariff, the Service Installation Guarantee ("SIG"), and the Service Assurance Warranty ("SAW"), which provide associated remedies to partially compensate its customers for substandard service delivery. In contrast, BellSouth has proposed sixty-eight (68) performance measures and 1,200 sub-metrics that capture information regarding service delivery of UNEs and resold services. For example, essential reporting of hold time performance in the ordering and maintenance centers, pending facilities status, and billing dispute resolution are available for UNEs, but not for special access. The tariffs do not provide adequate remedies for the late provision of services. (Testimony of Karen Kinard before the TRA on August 23, 2001, Vol. IV B, Page 28, Lines 14-18). As the TRA is aware, performance measures and enforcement mechanisms should improve BellSouth's quality of service, not afford an excuse for providing an inferior quality of service to CLECs.

During the proceedings, BellSouth has argued that CLECs such as Time Warner have a choice between supplementing networks facilities through special access or through the purchase of UNEs. (Testimony of David A. Coon before the TRA on August 21, 2001, Volume II C, Page 3, Lines 21-25). BellSouth submits that it should not have to provide any measurements beyond those set forth in the FCC tariffs. (Id., Page 6, Lines 8-11; Page 7, Lines 2-6; Page 14, Lines 6-15; Page 19, Lines 8-15). Rather than address the disparity in performance measures between special access and UNEs, BellSouth offered the solution that if CLECs such as Time Warner want additional measures and remedies, they should switch to UNEs. (Id., Page 10, Lines 17-23; Page 16, Lines 23-25;

Page 19, Lines 15-19). BellSouth admitted, however, that at the time it entered into an interconnection agreement with Time Warner in 1996, UNEs were not available. (Id., Page 13, Lines 22-25). Further, ASRs were the only vehicle available for ordering special access, the only network element made available by BellSouth. To date, BellSouth has not made any service or combination of services available to its CLEC customers materially comparable to special access.

BellSouth agreed that it would be easier to have similar performance measures between UNEs and special access, at least from an administration standpoint. (Id., Page 32, Lines 4-9). BellSouth further admitted that the measurements between special access and UNEs are not equal, going so far as to agree that CLECs who choose special access are in effect penalized for the choice. (Id., Page 14, Lines 18-20; Page 16, Lines 16-23). This penalty is levied despite the fact that special access is a premium service and a higher price to the CLEC. (Id., Page 17, Line 22, through Page 18, Line 4). CLECs should not be discouraged from choosing special access, as it provides better service than UNEs; it has a stable, automated ordering platform and service order guidelines, while the ordering platform for UNEs is unstable and is frequently down and has no such guidelines. (Testimony of Thomas E. Allen before the TRA on August 22, 2001, Vol. III D, Page 3, Lines 9-22). As Director Greer correctly pointed out, the Telecommunications Act was intended to foster competition, not to select between competitors. (Coon Testimony, Page 17, Lines 1-8). With the disparity between UNEs and special access, BellSouth has forced the TRA to make such a selection.

Time Warner has identified nineteen (19) critical, reporting metrics across six (6) operational support system categories which should be measured in an effort to improve

the poor quality of BellSouth's services. These categories include ordering, provisioning, maintenance, billing, administrative and miscellaneous measures essential to ensure that purchasers of special access are receiving quality service. Absent such measurements, CLECs choosing to purchase special access services rather than UNEs will be competitively disadvantaged. CLECs should not be penalized based upon their mode of market entry. To exclude special access high capacity services from performance reporting requirements effectively penalizes CLECs because of their business decision to purchase high capacity services out of BellSouth's tariff instead of purchasing UNEs. BellSouth has created this decision for CLECs by not offering a local product comparable to special access. To permit BellSouth to penalize CLEC market entry via its unilateral, subjective classification of services is not supported by any rational basis and is anti-competitive. Special access services used to deliver mixed traffic (intrastate and interstate) cannot be functionally distinguished from the equivalent unbundled or resold services. These high capacity services are functionally equivalent whether offered pursuant to a tariff or an interconnection agreement and any supposed distinction is based entirely upon BellSouth's unilateral regulatory decision to offer a particular service through its state or federal tariffs instead of via an interconnection agreement. Without the imposition of such performance metrics on the equivalent special access services, BellSouth is able to avoid metrics and remedies simply by assigning a particular service to the most favorable regulatory classification.

In short, special access services ordered from tariffs has been an overlooked area of local market competition that requires immediate attention by the Commission to ensure that BellSouth provides special access services to CLECs on a nondiscriminatory basis.

Although BellSouth argued otherwise, there is no issue with treading on interstate commerce. Although special access lines may have both long distance and local usage on it, other states, such as New York and Minnesota, have regulated in this area, as it is a joint-use service which both states and the FCC can regulate. (Kinard Testimony, Pages 12-14 and 15-16).

Finally, although BellSouth argued that it was not afforded due process and was not given the opportunity to fully articulate its positions regarding special access, Time Warner provided sufficient notice of the issue by filing its petition on April 30, 2001 to have the issue included in this docket. (Kinard Testimony, Pages 44-47). Despite being given this notice, BellSouth did not file a motion to strike the issue or make an objection to its inclusion nor did BellSouth choose to sponsor a witness knowledgeable of the issue or offer a scintilla of credible evidence to counter to Time Warner's provision. (Id., Page 51). The due process argument lacks merit and the TRA should consider this serious issue regarding the disparity between UNEs and special access.

B. Other state commissions have recognized the importance of performance measurements in connection with incumbent local exchange carriers' provision of special access services to CLECs.

Other state commissions have taken steps to ensure that local competition develops by beginning to review the need for service standards for special access services. The New York Public Service Commission ("NYPSC") concluded an investigation into Verizon's performance and business services, including special access services, in June of this

year.² Notably, the NYPSC found that Verizon remains the dominant provider of such services in New York, and that there is evidence that Verizon has been discriminating against competitors in favor of its own retail customers in the provision of special services.

Similarly, the Texas Public Utilities Commission has ordered SBC to include special access services in its post section 271 performance plan. In response to complaints that special access service had deteriorated after Section 271 approval, the Commission found that, “to the extent a CLEC orders special access in lieu of UNEs, SWBT’s performance shall be measured as another level of disaggregation in all UNE measures.”³ Also, the Massachusetts Department of Telecommunications and Energy is currently considering petitions by CLECs to expand a pending investigation to include Verizon’s provisioning of special access services.

Additionally, the Colorado Public Utilities Commission ordered Qwest to include and disaggregate special access services in certain Performance Indicator Definitions (PIDs).⁴ The Commission found that “special access services are currently an important part of some CLECs’ offerings,” defining special access as “any circuits . . . ordered under the special access tariff by a CLEC in lieu of a UNE.” (pp. 78-82).

² NY PSC Case 00-C-2051 - *Proceeding to Investigate Methods to Improve and Maintain High Quality Special Services Performance* by Verizon New York, Inc.; and NY PSC Case 92-C-0665 - *Proceeding on Motion of the Commission to Investigate Performance Based Incentive Regulatory Plans for New York Telephone Company*. Order issued June 16, 2001.

³ Texas PUC project No. 20400 - *Section 271 Compliance Monitoring of Southwestern Bell Telephone Company of Texas*, Order No. 33, Approving Modification to Performance Remedy Plan and Performance Measurements, May 24, 2001.

⁴ Colorado PUC Case 011-041T - *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*. Decision No. R01-997-I, issued September 26, 2001.

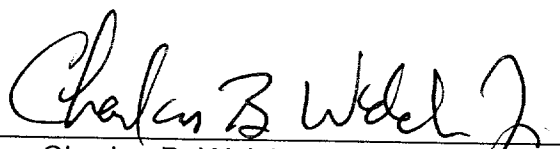
III. CONCLUSION

Using the same framework for special access services as is used for unbundled and resold services will result in a single measurement and enforcement process for all high capacity circuits, whether the order is special access, unbundled or resold products. Logically, special access services should be disaggregated and reported monthly by BellSouth together with other functionally equivalent high capacity unbundled or resale services. This would result in measurements and reporting for all "wholesale" services and ensure nondiscriminatory treatment regardless of the mode of market entry selected by a CLEC. Implementation of this process should prove to be far more efficient than creating and monitoring a separate regime designed especially for special access.

In the alternative, Time Warner submits that the Authority should require BellSouth to offer a local service or product which is, in all material respects, identical to special access. In this event, the rates, terms and conditions of such service would be included in BellSouth interconnection agreements and applicable performance measures and remedies would be available to all CLECs on a non-discriminatory basis.

Respectfully submitted,

**FARRIS, MATHEWS, BRANAN,
BOBANGO & HELLEN, P.L.C.**

BY: 

Charles B. Welch, Jr., #010468
Attorneys for Time Warner Telecom
of the Mid-South, L.P.
618 Church Street, Suite 300
Nashville, TN 37219
(615) 726-1200

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by placing same in U.S. Mail, postage prepaid, hand delivery, or via facsimile transmission, this the 9th day of October, 2001, upon the following:

Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce St., Suite 2101
Nashville, TN 37201-3300

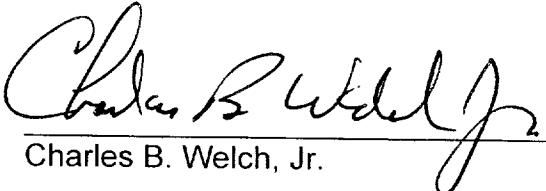
Jim Lamoureux, Esq.
AT&T Communications of the South
Central States
Room 8068
1200 Peachtree St., NE
Atlanta, GA 303039

Tim Phillips, Esq.
Office of the Attorney General
Consumer Advocate and Protective
Division
PO Box 20207
Nashville, TN 37202

Henry Walker, Esq.
Boult, Cummings, Conners & Berry
414 Union St., Suite 1600
PO Box 198062
Nashville, TN 37219

Jon E. Hastings, Esq.
Boult, Cummings, Conners & Berry
414 Union St., Suite 1600
PO Box 198062
Nashville, TN 37219

Dana Shaffer
XO Tennessee, Inc.
105 Molloy St.
Nashville, TN 37201


Charles B. Welch, Jr.